

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Revocation of the
License of Cruz Ellis To Provide Child
Foster Care

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above matter came on for hearing before Administrative Law Judge M. Kevin Snell on August 24, 2010, at the Ramsey County Courthouse, 15 West Kellogg Boulevard, St. Paul, Minnesota. The OAH record closed on September 9, 2010, upon receipt of the parties' post-hearing briefs.

Edward Kaiser, Assistant Ramsey County Attorney, St. Paul, Minnesota 55102-1556, appeared at the hearing as attorney for the Minnesota Department of Human Services and the Ramsey County Community Human Services Department. Lindsay Davis, Southern Minnesota Regional Legal Services, appeared at the hearing as attorney for the Licensee, Cruz Ellis.

STATEMENT OF THE ISSUES

- 1) Should the disqualification of Steven Ellis be set aside; and
- 2) Should the Department of Human Services' order of revocation of Cruz Ellis' child foster care license be affirmed because a disqualified individual was residing in her day care home?

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Ms. Cruz Ellis ("Licensee") has been licensed to provide child foster care services for over 10 years at her home in St. Paul, Ramsey County, Minnesota ("the home").¹ Licensee provides room and board for foster children up through age 18 and ensures that all of their needs are met with supervision, security and stability. These needs include 24-hour parenting, nutrition, arranging for schools, arranging for medical care and therapy, coordination of family visitation, providing transportation, and, in some cases, assisting with reunification of children with their family.² Licensee has excellent

¹ Testimony of Cruz Ellis.

² Test. of Ida Njee, Ramsey County Social Worker and child foster care licensor.

skills and has successfully cared for foster children with special needs, including foster children with severe mental health problems.³

2. Licensee's adult daughter is one of three adult women that are qualified, adult/substitute/caregivers.⁴

3. In her 10 years of providing child foster care, Licensee has had no licensing violations or other licensing issues with the exception of the disqualification of her son, Steven Ellis, born May 15, 1984, that is at issue in this proceeding.⁵

4. Steven Ellis lived primarily with Licensee until early 2004, when he moved to Woodbury, Minnesota, to live with a cousin. Mr. Ellis removed all of his belongings when he moved out of Licensee's home. Mr. Ellis has received his mail where he actually lived since he moved out in 2004. Mr. Ellis and his cousin moved to Brooklyn Center, Minnesota, in April 2004, and was Mr. Ellis' primary residence for approximately three years. Mr. Ellis also lived in Florida for a few months at a time with his cousin's wife's parents.⁶

5. Steven Ellis was arrested by the St. Paul Police on November 3, 2004, after the officers had responded to a report of an aggravated assault near 354 Hope Avenue, St. Paul, Minnesota. Mr. Ellis was acting suspiciously, was uncooperative when approached and resisted arrest. During a custodial search a large package of crack cocaine was found in the right front pocket of his trousers. An eyewitness to the aggravated assault stated that Mr. Ellis was not the person involved in the assault. The police report listed Mr. Ellis' address as Licensee's home.⁷

6. On February 3, 2005, Mr. Ellis pled guilty to and on April 28, 2005, was convicted of possession of a controlled substance in violation of Minn. Stat. § 152.023, subd. 2 (1). The Register of Actions for Mr. Ellis' case lists Licensee's home as his address.⁸

7. During his probation period following his conviction and incarceration, Mr. Ellis listed his Brooklyn Center, Minnesota, address as his residence and received his mail there.⁹

8. Mr. Ellis completed chemical dependency treatment in 2006.¹⁰

³ *Id.*

⁴ *Id.*; Test. of C. Ellis; Ex. 3.

⁵ Test. of I. Njee and C. Ellis.

⁶ Test. of Steven Ellis.

⁷ Ex. 6.

⁸ Ex. 5.

⁹ Test. of S. Ellis.

¹⁰ Ex. 8.

9. In 2007, Mr. Ellis was employed by Extreme Clean where he cleaned carpets. He then worked for Sealy Mattress where he made mattresses.¹¹

10. In March 2009, a new County licensor, Ms. Ida Njee, took over supervision of Licensee's child foster care license.¹²

11. On May 27, 2009, the County licensor was present when Licensee filled out the paperwork for renewal of her child foster care license, including the Child Foster Care Annual Review form.¹³ The Child Foster Care Annual Review form states, in applicable part:

Please provide the following information to help you and your licensing social worker assess your experiences as a foster parent during the past year. At your request your licensing worker will help you complete this review.¹⁴

Because the County licensor had seen Mr. Ellis asleep on a couch in Licensee's home earlier in May, she told Licensee to list Steven Ellis as a resident on the form. The County licensor told licensee that,

We need to do this right. We need to get his fingerprints and have him on the License.¹⁵

Licensee did as instructed. Licensee also wanted her son listed in the hope that he could be available as a qualified substitute caregiver.¹⁶

12. The County licensor has not seen Mr. Ellis at Licensee's home since May 2009, and has received no reports of him being in the home thereafter. Licensee advised the County licensor at that time that her son did not live with her.¹⁷

13. Mr. Steven Ellis has never provided care to Licensee's foster children and had expressed no desire to do so prior to May 27, 2009.¹⁸ Mr. Ellis was willing, because of his mother's desires, to help her care for foster children if necessary. Only Licensee and the three substitute caregivers have provided care to Licensee's foster children.¹⁹

14. Some time in 2009, Mr. Ellis began living at 164 Wyoming Street East, St. Paul, Minnesota. He received his mail at that address, including hospital invoices, cell phone invoices, a notice from Ramsey County Human Services, and his paychecks

¹¹ Test. of S. Ellis.

¹² Test. of I. Njee.

¹³ *Id.*; Test. C. Ellis.

¹⁴ Ex. 3.

¹⁵ Test. of I. Njee.

¹⁶ Test. of C. Ellis.

¹⁷ Test. of I. Njee.

¹⁸ *Id.*; Test. of I. Njee and S. Ellis; Ex. 8.

¹⁹ *Id.*; Ex. 3.

from General Nutrition Corporation. It is also the address on his driver's license.²⁰ The Wyoming address is approximately 4.71 miles from Licensee's home.²¹

15. The routine annual background checks for 2009 on Licensee, her daughter, the two other substitute caregivers, and Mr. Ellis were completed and revealed Mr. Ellis' felony conviction.²²

16. On June 29, 2009, the County sent Mr. Ellis a letter at Licensee's address, notifying him of the disqualification from direct contact with or access to persons served by the Department. The section of the letter titled "WHAT HAPPENS WHILE THE RECONSIDERATION IS BEING PROCESSED?" specifically states, in applicable part:

It has been determined that you pose a risk of harm to persons served by the program that requires you to be under continuous, direct supervision whenever persons served by the program are present. Therefore, you are required to be within sight or hearing of another adult caregiver.²³

17. On July 14, 2009, Licensee invited her son over to her home to complete the paperwork for a request for reconsideration of his disqualification. Mr. Ellis was frustrated, wanted to give up and did not want to fill out the paperwork. Licensee completed the form titled Suggested Form for Request for Reconsideration of Disqualification Due to a Criminal Offense, while asking Steven Ellis the questions and writing his oral answers. Licensee listed her address for Mr. Ellis because his disqualification letter had been sent to her. She did not intend to imply that her son was actually living with her.²⁴

18. On July 14, 2009, Mr. Ellis was under continuous, direct supervision and within sight and hearing of Licensee at all times when he was present in her home.²⁵

19. In January 2010 one of Licensee's foster children, without Licensee's knowledge or permission, went into the basement of the home and dyed her own hair. Licensee received a letter from the girl's biological mother giving permission for Licensee to have the girl's hair cut. Because of Mr. Ellis' training, Licensee invited him to her home to cut the girl's hair and that of another foster child. Mr. Ellis came to Licensee's home on January 10, 2010, and with Licensee and Mr. Ellis' girlfriend present at all times, gave haircuts to the two foster children in the kitchen.²⁶

²⁰ Test. of S. Ellis; Exs. 14 –18.

²¹ Ex. 20.

²² Test. of I. Njee and C. Ellis.

²³ Ex. 7.

²⁴ Ex. 8. Test. of C. Ellis.

²⁵ Test. of C. Ellis, S. Ellis.

²⁶ Ex. 17.

20. On January 10, 2010, Mr. Ellis was under continuous, direct supervision of and within sight and hearing of Licensee at all times when he was present in her home.²⁷

21. Licensee has not had a foster child living with her since February 2010.²⁸

22. On February 13, 2010 the Department completed a Risk of Harm Assessment – Reconsideration of Disqualification, indicating a decision not to set aside the disqualification. The explanations sections stated:

No documentation of successful rehabilitation.

Household/family member.²⁹

23. Mr. Ellis moved in with his uncle, Edward Montantes, at 604 Oakdale Avenue, St. Paul, Minnesota in March 2010, and has lived there continuously since that time.³⁰ Mr. Montantes' home is 4.31 miles from Licensee's home.³¹

24. On April 22, 2010, the Department sent a letter to Mr. Ellis at his address at 164 E. Wyoming, St. Paul, Minnesota. The letter advised him of the Department's decision not to set aside his disqualification, stating that the following factors were determinative:

1. The serious nature of the disqualifying offense.
2. The vulnerability of the persons served in the program, with whom you may have direct contact or access. The clients to be served are children and are vulnerable because of their age and size.
3. You have not submitted documentation of successful completion of pertinent training or rehabilitation.

The letter went on to state, "You were previously ordered to remain under continuous direct supervision when persons receiving services from the program are present. This order remains in effect."³²

25. On April 22, 2010, the Department issued to Licensee an Order of Revocation to Licensee of "your license to provide child foster care under the provisions of Minnesota Rules, parts 2960.3000 to 2960.3340." The letter references Minn. Stat. §§ 245A.04, 245A.07, and Minn. R. part 2960.3000. It does not refer to Minn. R. 9502.0300 to 9502.0445, which govern family child care licensees. The letter further states:

²⁷ Test. of C. Ellis, S. Ellis.

²⁸ Test. of C. Ellis.

²⁹ Ex. 7.

³⁰ Test. of S. Ellis and Edward Montantes; Exs. 12, 13.

³¹ Ex. 21.

³² Ex. 7.

You were previously ordered to ensure that the disqualified individual is under continuous direct supervision whenever persons served by the program are present. This order remains in effect.³³

26. Licensee does not and has never had a license to provide family child care that is governed by Minn. R. 9502.0300 to 9502.0445.³⁴

27. Mr. Ellis is currently enrolled in cosmetology school, which he attends from 9:00 a.m. to 2:30 p.m. He will graduate in November 2010. He also works full-time from 3:00 p.m. until 11:00 p.m.³⁵

28. During his visits to Licensee's home after 2006, Mr. Ellis was under Licensee's direct supervision at all times and had no direct, unsupervised contact with any of the foster children in Licensee's care.³⁶

29. Licensee has a large, extended family, including her brother Edward Montantes and others.³⁷

30. Mr. Ellis talks to Licensee on the telephone almost daily, but does not visit her at her home. Mr. Ellis participates in the family gatherings and events at locations other than Licensee's home. These events occur approximately three times a month and include birthdays, church, graduations and other parties and celebrations such as the birth of children.³⁸

31. Licensee will continue not to allow Mr. Ellis to visit her in her home when foster children are present during the period of his disqualification.³⁹ On April 27, 2010, Licensee filed a timely appeal from the order of Revocation and requested an appeal hearing pursuant to Minn. Stat. § 245A.07.⁴⁰

32. On May 3, 2010 the Department executed a Notice of and Order for Hearing, scheduling a contested case hearing on July 12, 2010. Neither the Notice of and Order for Hearing nor any of its attachments reference Minn. R. 9502.0300 to 9502.0445, which govern family child care licensees, as applicable to child foster care or as a basis for the license revocation.⁴¹

33. On June 9, 2010, the Administrative Law Judge issued a Protective Order.

34. A request for continuance was granted and, pursuant to a Scheduling Order dated July 14, 2010, the hearing was rescheduled for August 24, 2010.

³³ Ex. 1.

³⁴ Test. of C. Ellis.

³⁵ Test. of S. Ellis.

³⁶ Test. of C. Ellis; Ex. 11.

³⁷ Test. of S. Ellis, C. Ellis and E. Montantes.

³⁸ *Id.*

³⁹ Test. of C. Ellis; Ex. 11.

⁴⁰ Ex. 9.

⁴¹ Notice and Order for Hearing.

35. At the August 24, 2010 hearing, the Department argued and alleged for the first time that Minn. R. 9502.0335, subd. 6 D, regarding family child care licensees, applies to child foster care licensees and that Licensee violated that rule. The Department did not request and was not granted leave to amend the Notice and Order of Hearing.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Minnesota Department of Human Services have authority to consider and rule on the issues in this contested case hearing pursuant to Minn. Stat. §§ 14.50 and 245A.08.

2. Minn. R. 1400.5600 regarding the requirements for the notice and Order for Hearing provides in applicable part:

Unless otherwise provided by law, a notice of and order for hearing . . . shall contain . . . the following:

D. A statement of the allegations or issues to be determined together with a citation to the relevant statutes or rule allegedly violated or which control the outcome of the case.

3. Neither the Notice of and Order for Hearing, its attachments, nor the Order of Revocation reference Minn. R. 9502.0300 to 9502.0445 as applicable to child foster care or as a basis for the license revocation. Those rule parts apply to family child care licensees and are therefore not relevant or a part of this proceeding. Any violations related thereto are not before the Administrative Law Judge or the Commissioner.

4. Except as stated in Conclusions 2 and 3 above, the Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled.

5. Minn. Stat. § 245A.07, subd. 3, allows the Commissioner to suspend or revoke a license or impose a fine if a license holder fails to comply with the applicable laws or rules. Notice of any such action must be given by certified mail and must state the reasons for the sanction.

6. Under Minn. Stat. § 245A.08, subd. 3, the burden of proof first lies with the Commissioner, who may demonstrate reasonable cause for the action taken by submitting statements, reports, or affidavits to substantiate the allegations that the license holder failed to comply fully with applicable law or rule. If the Commissioner demonstrates that reasonable cause existed, the burden shifts to the license holder to demonstrate by a preponderance of the evidence that she was in full compliance with

those laws or rules allegedly violated, at the time that the Commissioner alleges the violations occurred.

7. Minn. Stat. § 245C.03, subd. 1(2), requires that background studies be conducted regarding “an individual age 13 and over living in the household where the licensed program will be provided.”

8. Minn. Stat. § 245C.14 regarding **DISQUALIFICATION** provides in relevant part:

Subdivision 1. **Disqualification from direct contact.** (a) The commissioner shall disqualify an individual who is the subject of a background study from any position allowing direct contact with persons receiving services from the license holder . . . upon receipt of information showing, or when a background study completed under this chapter shows any of the following:

(1) a conviction of, admission to, or Alford plea to one or more crimes listed in section 245C.15, regardless of whether the conviction or admission is a felony, gross misdemeanor, or misdemeanor level crime;

9. Minn. Stat. § 245C.15 regarding **DISQUALIFYING CRIMES OR CONDUCT** provides in relevant part:

Subd. 2. **15-year disqualification.** (a) An individual is disqualified under section 245C.14 if: (1) less than 15 years have passed since the discharge of the sentence imposed, if any, for the offense; and (2) the individual has committed a felony-level violation of any of the following offenses: . . . chapter 152 (drugs; controlled substance); or a felony-level conviction involving alcohol or drug use.

10. Steven Ellis was convicted of a chapter 152 drug offense listed in Minn. Stat. § 245C.15 and is therefore disqualified for 15 years from having direct contact with children being cared for by Licensee, as required by Minn. Stat. § 245C.14.

11. Minn. R. 2960.3010, subp. 14 provides, in applicable part:

‘Direct contact’ means providing face-to-face care, training, supervision, counseling, consultation, or medication assistance to a child.

12. Mr. Ellis was not providing face to face care by cutting the hair of two of Licensee’s foster children, while supervised by Licensee, in January 2010 and was therefore not in violation either of Minn. Stat. § 245C.15 or Minn. R. 2960.3010, subp. 14.

13. Under Minn. Stat. § 245C.14, subd. 2(b), an individual's disqualification may be set aside if the individual does not pose a risk of harm to any person served by the Licensee. In determining whether an individual does not pose a risk of harm, the factors to be considered are:

1. The nature, severity, and consequences of the event or events that led to the disqualification;
2. Whether there is more than one disqualifying event;
3. The age and vulnerability of the victim at the time of the event;
4. The harm suffered by the victim;
5. The similarity between the victim and the person served by the program;
6. The time elapsed without a repeat of the same or similar event;
7. Documentation of successful completion by the individual studied of training or rehabilitation pertinent to the event; and
8. Any other information relevant to reconsideration.⁴²

14. The Department proved by a preponderance of the evidence that Mr. Ellis presents some risk of harm to the children in Licensee's care.⁴³ Therefore, the Commissioner should not set his disqualification aside.

15. The Commissioner has advanced evidence establishing reasonable cause to believe that, prior to issuing its Order of Revocation, Licensee allowed a disqualified individual to remain a resident in the household, resulting in a violation of Minn. Stat. §§ 245A.07 and 245C.14.

16. Licensee has proved by a preponderance of the evidence that she was in compliance with Minn. Stat. §§ 245A.07 and 245C.14 and the Commissioner's orders and directives, and did comply with the law because Steven Ellis was neither a resident in the home on or after May 27, 2009, nor was he allowed unsupervised direct contact with Licensee's foster care children.

17. Minn. Stat. § 245A.04 provides in applicable part:

Subd. 6. **Commissioner's evaluation.** Before issuing, denying, suspending, revoking, or making conditional a license, the commissioner

⁴² Minn. Stat. § 245C.22, subd. 4.

⁴³ Minn. Stat. § 245C.22, subd. 4.

shall evaluate information gathered under this section. The commissioner's evaluation shall consider facts, conditions, or circumstances concerning the program's operation, the well-being of persons served by the program, available consumer evaluations of the program, and information about the qualifications of the personnel employed by the applicant or license holder. The commissioner shall evaluate the results of the study required in subdivision 3 and determine whether a risk of harm to the persons served by the program exists. In conducting this evaluation, the commissioner shall apply the disqualification standards set forth in chapter 245C.

18. As provided in Minn. Stat. §§ 245A.04, subd. 6, and 245C.16, the County and the Department considered some facts, conditions, and circumstances concerning the program's operation and the vulnerability of persons served by the program. The County and the Department did not consider available consumer evaluations of the program, information about the unique qualifications of the Licensee and personnel employed by the Licensee, the value of continuity of care and the overall well being of the children in Licensee's care. The Commissioner evaluated the results of the background study for Mr. Ellis and applied the disqualification standards set forth in chapter 245C.

19. Minn. Stat. § 245A.07, subd. 1, requires the Commissioner to consider "the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights" of those persons in a licensee's program before applying sanctions under Minn. Stat. § 245A.07.

20. Minn. Stat. § 245A.06, subd. 1., concerning **Correction Orders and Conditional Licenses** provides in relevant part:

(a) If the commissioner finds that the applicant or license holder has failed to comply with an applicable law or rule and this failure does not imminently endanger the health, safety, or rights of the persons served by the program, the commissioner may issue a correction order and an order of conditional license to the applicant or license holder. When issuing a conditional license, the commissioner shall consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program.

36. The health, safety, or rights of the children served by the Licensee have not been in imminent danger at any time.

37. These Conclusions are reached for the reasons set forth in the Memorandum below, which is hereby incorporated by reference into these Conclusions.

38. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions, and as Findings any Conclusions that are more appropriately described as Findings.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge recommends to the Commissioner of Human Services that:

- (1) The disqualification of Steven Ellis not be set aside; and
- (2) The revocation of the child foster care license of Ms. Cruz Ellis be withdrawn and rescinded.

Dated: October 11, 2010

s/M. Kevin Snell

M. KEVIN SNELL
Administrative Law Judge

Reported: Digitally recorded; no transcript prepared.

NOTICES

This report is a recommendation, not a final decision. The Commissioner of Human Services will issue a final decision after reviewing the administrative record, and he may adopt, reject or modify the Administrative Law Judge's Findings of Fact, Conclusions, and Recommendations. The parties have 10 calendar days after receiving this recommended decision in which to file any exceptions to the report with the Commissioner.⁴⁴ Parties should contact the office of Cal Ludeman, Commissioner of Human Services, Box 64998, St. Paul MN 55155, (651)431-2907 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minnesota law, the Commissioner of Human Services is required to serve his final decision upon each party and the Administrative Law Judge by first-class mail.

⁴⁴ Minn. Stat. § 14.61.

MEMORANDUM

Set Aside of the Disqualification of Steven Ellis

Based on the evidence and application of the law, the Department's determination regarding the disqualification of Mr. Ellis is correct. Conviction for the commission of certain crimes carries with it a mandatory disqualification from direct contact with persons being cared for in programs licensed by the Department. Neither the Commissioner nor the Administrative Law Judge may sidestep or overlook those disqualifications. There is no discretion once those determinations become final. Depending on the seriousness of the crime, as determined by the legislature when creating the law, a disqualification may be permanent, for a period of 15 years, for a period of 10 years, or for a period of seven years. Mr. Ellis' disqualification falls into the 15-year category.

One of the two issues remaining to be determined in this proceeding is whether or not Mr. Ellis' disqualification should be set aside.

The law allows the Commissioner to set aside a disqualification only for the purposes of the individual licensed program that is involved if the disqualified individual poses no risk of harm to the persons served by that program. Mr. Ellis, in the July 2009 request for reconsideration states only three essential facts. First, he stated that he does not provide services to the foster children. Second, he stated that he had successfully completed chemical dependency treatment. While the first statement may have been true at that time, he did provide care to foster children in January 2010 by cutting their hair. With regard to the second factor, the Department correctly states in its reconsideration decision that Mr. Ellis did not provide documentation of this rehabilitation as required by the statute. The other answers regarding treatment, training, and rehabilitation were vague, non-factual and unpersuasive. Third, Mr. Ellis indicated that he was employed in 2007.⁴⁵

At the hearing Mr. Ellis testified regarding his current full-time employment and enrollment in cosmetology school. These are admirable activities and indicate that Mr. Ellis is on the right path for his future. However, documentation regarding these activities is lacking and would be useful. Also, the record is silent regarding whether or not Mr. Ellis has or has not been involved in illegal activities since 2004. The record contains no affirmative assurances that Mr. Ellis has not and will not in the future return to illegal behavior.

Although the weight of the evidence is close on this issue, it is more likely than not that Mr. Ellis presents some risk of harm to the children in Licensee's care as determined by the Commissioner in his denial of the request for reconsideration. The disqualification should not be set aside at this time. Licensee has the right to request a variance that would permit some flexibility for Mr. Ellis to visit her home. Upon a thorough presentation to the Commissioner of facts addressing the risk factors in Minn.

⁴⁵ Conclusion 12.

Stat. § 245C.14, subd. 2(b), it would be appropriate for the Commissioner to consider a future set-aside or variance.⁴⁶

Licensee's Child Foster Care License

Residence of Steven Ellis

The Commissioner presented ample documentary evidence, prepared by Licensee, to establish reasonable cause to believe that Mr. Ellis resided with Licensee as late as July 14, 2009, therefore requiring the Commissioner to issue an Order of Revocation. Even though the evidence presented at the hearing established that it is more likely than not that Mr. Ellis was not living with Licensee in May of 2009, the documentary evidence submitted to the Department in 2009 continued to suggest otherwise. The Administrative Law Judge has determined that vague and inaccurate advice from the County licensor, coupled with wishful but misguided intentions of an unsophisticated Licensee generated this licensing action. That is what led to Licensee erroneously listing her address as the residence of her son. What the Licensee and the County knew to be the facts about Mr. Ellis' residence did not become known to the Department until sometime in early 2010. The Department knew Mr. Ellis did not live with Licensee at the time the Order of Revocation was issued on April 22, 2010, because it sent Mr. Ellis its decision on reconsideration to his Wyoming Street address.

Licensee proved by a preponderance of the evidence that her son physically moved out of the home in 2004. The evidence in the record suggests that his primary residence changed periodically, but was still not at Licensee's home. Unfortunately, documentation did not keep pace with Mr. Ellis' actual residences. The facts allow no dispute that Mr. Ellis has lived elsewhere since some time in 2009. There is no reliable evidence in the record to suggest that Mr. Ellis was present in Licensee's home and unsupervised by Licensee when foster children were present. The credibility of Licensee and her witnesses was greater than that of the County licensor on disputed material facts. The County licensor was vague and/or unsure about dates and events and her testimony was contradictory.

The Department argues that Mr. Ellis resided in Licensee's home in July 2009, because the County licensor saw a person she believed to be Mr. Ellis sleeping on a couch in Licensee's home in May 2009. Although Mr. Ellis may have been present in the home, there is no evidence in the record that children were present or that Mr. Ellis was living there. The fact that Mr. Ellis was sleeping on a couch is insufficient evidence to lead a reasonable person to conclude that he was living in the home.

In addition, the Department argues that Mr. Ellis resided in Licensee's home prior to March 2009, which was the time the County licensor took over supervision of Licensee's file. The County licensor testified that an unknown number of foster children of unknown ages told the prior licensor that Mr. Ellis lived in Licensee's home. There are two problems with relying on this testimony. First, the testimony is double hearsay.

⁴⁶ Minn. Stat. § 245C.30

Second, it involves children of uncertain ages. The record does not indicate whether these children were toddlers, preschoolers or 17 years old. The reliability of the double hearsay statements cannot be evaluated in terms of comparison to other evidence and sworn testimony, cannot be evaluated in terms of weighing the credibility of a child's statement based on the age and communication ability of the child, the inability to examine the manner and objectivity of the way in which questions were presented, and whether the presence and participation of others during any interviews influenced the responses of the child. Were responses suggested by participants, were compound questions used, was there a failure to ask follow-up questions? There is insufficient indicia of reliability to permit the Administrative Law Judge to give weight to such testimony. Such testimony is not the type of evidence that reasonable, prudent persons are accustomed to rely on in the conduct of their serious affairs.⁴⁷

Finally, there is no evidence in the record to support any claim that Mr. Ellis had unsupervised contact with foster care children after receiving notice of his disqualification.

Applicability of Child Care Licensing Rules

The Department presented a novel argument at the hearing: that Minn. R. 9502.0335, subd. 6 D, regarding family child care licensees, applies to child foster care licensees and that Licensee violated that rule. The Administrative Law Judge did not consider this rule because the argument and allegation is not properly before this tribunal or the Commissioner.⁴⁸

Although the Administrative Law Judge is not obliged to address the various arguments presented by the Department as to why Minn. R. 9502.0335, subd. 6 D would apply to child foster care, four observations will be made. First are the problems with procedural due process that were addressed in Conclusions 2 and 3 above. Second, Minn. R. 2960.3020 regarding the licensing process for child foster care provides in applicable part:

Subp. 10. Other licenses. A license holder cannot concurrently hold a license for family child care or adult family foster care without a variance from the licensing agency.

There is no evidence in the record that Licensee has such a variance that would allow her to provide family child care. Third, Minn. R. 2960.3070 regarding foster parent training does not include any requirement or opportunity for training in family child care rules. There can be no reasonable expectation that a child foster care Licensee knows anything about family child care regulations unless the Licensee holds a dual license. Finally, Minn. Stat. § 645.17 (1) of the rules of statutory construction provides that a court, when reviewing a statute, assumes that the legislature does not intend absurd or

⁴⁷ Minn. R. 1400.7300, subp. 1; Minn. R. 1400.8607, subp. 1.

⁴⁸ Conclusions 2, 3.

unreasonable results.⁴⁹ Likewise, the Administrative Law Judge assumes that the Department did not intend for the rules of its separate programs to be applied in a fashion to produce such results.⁵⁰

Conclusion

There is no evidence in the record to indicate that health, safety, or rights of the children in Licensee's care were in imminent danger at any time.

The facts establish that Licensee is now and has been in compliance with the law and was in full compliance with the Commissioner's orders and directives during the nine months that the Department was considering the request for reconsideration of the disqualification. There is no reasonable basis for Licensee's child foster care license to be sanctioned.⁵¹ If the Commissioner disagrees, concludes that there has been a violation of law or rule, a Conditional License would be appropriate that: places restrictions and conditions for visits to Licensee's home by her son; and contains tailored supervision requirements for when foster children participate in the Ellis extended family gatherings.

For these reasons, the Administrative Law Judge recommends that the Order of Revocation be rescinded.

M. K. S.

⁴⁹ *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 278 (Minn. 2000).

⁵⁰ *See, also, In Re Strecker*, 777 N.W.2d 41, footnote 1 at 49 (Minn. App. 2010).

⁵¹ Minn. Stat. § 245A.07, subd. 1.